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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. [redacted] 99

THE UNITED CORPORATION,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May 25, 1954.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on February 26, 1954.

Opinions Below

The findings and opinion of the Securities and Exchange Commission (R. 26a), Holding Company Act Release No. 12000, are unreported. The opinion of the Court of Appeals (R. 88) is reported in 211 F. 2d 231.

NOTE: All record references herein are to the Appendix to Petitioner's Brief, pages 1a to 45a, or to the record of the proceedings in the Court below, pages 46 to 93. For convenience, The United Corporation will sometimes be referred to as "United", the Securities and Exchange Commission as "the Commission", Public Service Corporation of New Jersey as "Public Service" and the Public Utility Holding Company Act of 1935 as "the Act."

Jurisdiction

The Judgment of the Court of Appeals (R. 93) was entered on February 26, 1954. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 15 U. S. C. § 79X.

Questions Presented

1. Whether the Securities and Exchange Commission's denial of a holding company's claim against a statutory subsidiary for reimbursement of reasonable expenses incurred in rendering admittedly beneficial services in the reorganization of the latter under Section 11(e) of the Public Utility Holding Company Act of 1935 raised "legal issues" in the sense in which that term must be used when considering the appropriate scope of judicial review; and, if such issues were raised, whether the Court below erroneously limited the scope of its review to the question of whether the Commission acted reasonably.

2. Whether the principles laid down by the federal courts to govern the payment of fees and expenses in proceedings under Chapter X of the Bankruptcy Act must be considered and applied in determining fees and expenses under Section 11(e) of the Public Utility Holding Company Act; and, if those principles are applicable, whether their effect in supporting reimbursement in this case could be avoided on the ground that the petitioner volunteered its services to the reorganization for reasons of its own.

3. Whether petitioner's expenditures, instead of being "voluntary" (R. 92), were incurred in performing a duty imposed by the Public Utility Holding Company Act (R. 37a); and, if they were, whether the denial of reimbursement can be sustained on that ground.

4. Whether the Commission's rejection of the petitioner's claim amounted to unreasonable discrimination in

violation of the petitioner's rights under the Fifth Amendment to the Constitution.

5. Whether the determination by the Court below that the reorganization of petitioner under the Public Utility Holding Company Act included the reorganization of its statutory subsidiary and that therefore United should bear its own costs (R. 92) is in fundamental conflict with the decision of the Court of Appeals for the Second Circuit in *In re Electric Power & Light Corp.*, 210 F. 2d 585 (1954), which rejected the contention that the reorganization of a subsidiary is part of the reorganization of its parent and held that the Securities and Exchange Commission had no jurisdiction over amounts paid by a holding company to a financial adviser for services rendered to it in connection with the reorganization of its statutory subsidiary.

Statement

The United Corporation, a registered holding company under the Public Utility Holding Company Act of 1935, appealed to the Court of Appeals for the Third Circuit from an order of the Securities and Exchange Commission, dated June 16, 1953 (R. 22a), denying United's application, as a claim against Public Service Electric and Gas Company, the surviving corporation, for payment of amounts to cover expenses incurred by United in the reorganization of the public utility system of Public Service Corporation of New Jersey through proceedings under Section 11(e) of the Act. The total amount of United's claim is $33,580.56, which was expended by it for services of counsel, engineering and investment analysis and miscellaneous items (R. 35a).

The Commission specifically found that the amounts claimed by United were reasonable (R. 38a) and that United's participation in the proceedings did in fact contribute to the development of the reorganization plan

(R. 36a). It held, however, that United itself should assume the expenses of its participation rather than the surviving corporation of the reorganized system. The Commission approved the payment by Public Service Electric and Gas Company of the reasonable expenses of all other parties and participants in the reorganization proceedings whose services, the Commission found, had contributed to the Plan.

The United Corporation is an investment company organized under the laws of the State of Delaware. By virtue of its ownership of more than 10 percent (although in each case much less than a majority) of the voting securities of several public utility systems, including that of Public Service Corporation of New Jersey, United was required in 1938 to register as a holding company under the Act. The Commission instituted direct proceedings against United, which resulted in an order issued under Section 11(b)(2) of the Act requiring United to change its capitalization to a single class of common stock and to take appropriate steps to cease to be a holding company. *The United Corporation,* 13 S. E. C. 854. Through sales and exchanges of securities United has since that time eliminated all of its preference stock and reduced its holdings of voting securities of each of its erstwhile statutory subsidiaries to less than 5% of the total outstanding.

At the time of the reorganization of the Public Service System United owned 22 per cent of the voting securities of Public Service Corporation of New Jersey, consisting of 1,542,318 shares of Public Service common. United now owns approximately three per cent of the voting securities of Public Service Electric and Gas Company. Although the largest holder of common stock, United's interest in the reorganization was identical with that of any other common stockholder. Its concern was to promote a plan that would meet the statutory requirements for integration of the Public Service System without impairing the value of the common stock.

The nature of United's participation in the Public Service reorganization

United's participation in the reorganization was active and continuous. It worked with the management of Public Service in formulating the Plan and its President served as a member of the reorganization committee. It was a party to the proceedings before the Commission. Its counsel took an active part in the proceedings, analyzed voluminous data submitted at the hearings and additional data prepared by engineers and analysts retained by United, and participated in numerous conferences and negotiations with respect to the Plan (R. 35a, 36a). The Plan, as supported by United, was approved by the Commission.

In its findings, the Commission recites without challenge United's claim that it was the sole effective representative of the common stock and that its participation benefitted all the stockholders of Public Service (R. 36a).

Furthermore, the Commission itself expressly found that United's participation was of benefit in the development of the Plan and that the amounts expended by United for legal and other services were reasonable (R. 36a, 37a). In other words, the Commission found that United's participation benefited the *general interest,* as well as its own interest as a stockholder.

That such findings are sufficient to justify compensation by the reorganized company is well established. The Commission itself stated (R. 33a):

> "Compensation may be paid for services which have contributed to the plan ultimately approved, which have contributed to the defeat of a proposed plan found to be unsatisfactory, or which have otherwise directly and materially contributed to the development of the proceedings with respect to the plan."

The basis for the exceptional denial of compensation to United

After finding that United had, in fact, contributed to the approved Plan, and that the amounts of compensation it claimed were reasonable, the Commission, nevertheless, rejected United's claim for reimbursement on new and extraneous grounds which are without the slightest support in the statute or in the legislative history of the Act.

The Commission concluded, without reference to a single authority, that, because United was itself a holding company with respect to the Public Service System, its claim for compensation should be denied (R. 37a).

The Commission professed to find that United, as a holding company, was charged with a duty under the Act to bring about Public Service's reorganization. It then decided, out of whole cloth, that United must bear the costs of participating in the reorganization (R. 36a).

The Commission also professed to find as another basis for disqualification the fact that United stood to advance its own compliance with the Act by a satisfactory reorganization of the Public Service System (R. 36a). From this fact, it appears to have reasoned, again without reference to any authority other than its own *ipse dixit*, that, since United must have had this special advantage in mind when it participated in the reorganization, it was not entitled to compensation for its services to the estate.

The Commission also asserted that United's position in the proceedings was in some undefined manner different from, and by implication antagonistic to, that of other security holders because it owned securities representing 22 per cent of the voting power, and as a holding company had the power under the Act to file a plan for Public Service (R. 37a). Again no authority was cited and no reason advanced for such a conclusion.

The basis of the decision of the Court of Appeals

Nowhere in the opinion of the Court of Appeals is there any review or analysis of the legal issues raised by the Commission's determination. Proceeding as if no questions of law were before it, and as if all that was involved was the exercise of administrative discretion and of expert judgment, the Court concluded that it was "unable to find that in this special kind of situation the Commission's determination was unreasonable" (R. 92), and that "the Commission's decision was in accordance with the high purpose of Section 11(e) and founded upon substantial evidence" (R. 92-93).

At one and the same time, the Court of Appeals appears to have found that United was under a statutory duty to bring about the reorganization of Public Service, but that the expenditures by United were "voluntary" (R. 91-92). However, the Court did not hold that the denial of reimbursement was proper because United was under a duty to participate or because its services were voluntary. Instead, the Court below found that United "possessed a strong, legitimately selfish reason for joining the affirmative attempt to bring Public Service within the statute" (R. 92) because this "constituted a direct part of United's effort toward the same objective" (R. 92) and United's reorganization "included the reorganization of Public Service" (R. 92).

REASONS FOR GRANTING THE WRIT

I

United was entitled to and was denied an independent judicial review and examination of the legal issues raised by the Commission's determination.

The Court below limited the scope of its review of the Commission's decision denying reimbursement to United to a determination that the decision was not unreasonable, was in accordance with the high purpose of Section 11(e) of the Act and was founded upon substantial evidence (R. 92-93). Clearly, however, the doctrine under which the courts, called upon to review matters involving the exercise of administrative discretion, limit the scope of their review to a determination of whether the administrative action has the necessary rational foundation (*S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947)), is inapplicable where, as here, the questions decided by the Commission were *questions of law* such as whether United's legal status as a registered holding company under the Act precluded its being reimbursed for expenses incurred in the reorganization of a statutory subsidiary. *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949); *S. E. C.* v. *Cogan*, 201 F. 2d 78 (9th Cir. 1951), *opinion on rehearing*, 201 F. 2d 82 (1952); *In re North American Light & Power Co.*, 101 F. Supp. 931, *opinion on rehearing*, 106 F. Supp. 686 (D. Del. 1952), *aff'd.* 202 F. 2d 638 (3d Cir. 1953), *cert. denied sub nom., S. E. C.* v. *Masterson*, 346 U. S. 818 (1953).

In *S. E. C.* v. *Central-Illinois Corp., supra,* involving a proceeding under Section 11(e) of the Act, this Court, while recognizing the doctrine of the second *Chenery* case, and its limitations on the scope of judicial review, nevertheless held that it will examine legal issues presented in a Section 11 proceeding and arrive at and enforce its own

conclusion with respect to those questions. Referring to Section 11(e), the Court stated (338 U. S. at p. 125):

> "* * * We do not think it was intended to define with accuracy the scope of review to be exercised over matters committed to the Commission's discretion and expert judgment, *not involving questions of law* * * *." (Emphasis supplied.)

In *S. E. C.* v. *Cogan, supra,* the Court of Appeals upheld the reversal of a Commission order denying compensation to an attorney for services rendered in a Section 11(e) proceeding. Reviewing the various tests advanced for distinguishing questions of law from questions of fact, including those furnished by the first and the second *Chenery* cases, the Court stated (201 F. 2d at p. 85):

> "Applying the tests thus outlined, we find no difficulty in concluding that the matters now before us and which were before the district court, in the language of the Central-Illinois case, supra, *'do raise legal issues'* in the broad sense in which that term must be used when we consider the appropriate scope of court review." (Emphasis supplied.)

The present case does not involve any question whether in fact a contribution was made to the reorganization or whether the amount of the requested allowance is reasonable. In determining such questions the Commission exercises discretion which the courts will respect in the absence of a clear abuse. However, when, as in the present case, it is admitted that the applicant has contributed to the reorganization and that the expenses it incurred in doing so are reasonable, only questions of law remain as to which the Commission's determination is not controlling. As this Court said in *R. F. C.* v. *Bankers Trust Co.,* 318 U. S. 163, 169 (1943), with reference to whether the services of an indenture trustee *were compensable under Section 77c(12) of the Bankruptcy Act:*

> "* * * After mentioning *matters of law which are for the court's determination* on review of the

> Commission's report, *such as whether the services in question are to be compensated under the provisions of the Act* * * *." (Emphasis supplied.)

In a recent article on the judicial review of allowances in Chapter X reorganizations, the author, referring to this very distinction between errors of law and abuses of discretion, states (Myers, Appellate Review in Chapter X Reorganizations, 53 Col. L. Rev. 1039, 1041, f. n. 9 (1953)):

> "In *Cooke* v. *Bowersock*, 122 F. 2d 977 (8th Cir. 1941), the bankruptcy court allowed compensation to attorneys for noteholders. The appellate court reversed, holding that the attorneys' services were not compensable as a matter of law. * * *
>
> "Here appears a *clear-cut distinction, drawn between services that are compensable, a question of law, and the value of compensable services, a question of discretion.* The case decides more than the exterior limits governing the amount of compensation that may be allowed; *it is a ruling on the compensability of the services rendered.* In *Rudnick* v. *Coney Island Boardwalk Corp.*, 181 F. 2d 775 (2d Cir. 1950), the same distinction appears * * *.
>
> "The difference between errors of law and abuse of discretion is also illustrated by decisions reversing the total disallowance of a claim, where the disallowance resulted from a misunderstanding of the statutory provisions governing (1) attorneys entitled to a fee in reorganization and (2) services compensable. See, e.g., *Heenehan* v. *Prudence Realization Corp.*, 108 F. 2d 103 (2d Cir. 1940) (under § 77B)." (Emphasis supplied.)

Nowhere in its opinion did the Court below review the questions of law raised by the Commission's determination. Thus the Court did not hold that the Commission was not bound, in determining fees and expenses under Section 11(e) of the Act, to apply the principles laid down by the federal courts in cases arising under Chapter X of the Bankruptcy Act; it did not hold that under the controlling principles of those cases "benefit to the estate" was not

the long accepted test for determining compensability; and it did not hold that United could be denied reimbursement because its services were rendered in the performance of a duty imposed by the Act.

Surely, when questions of law such as these are presented, administrative action cannot be sustained on the ground that the Court is "unable to find that in this special kind of situation the Commission's determination was unreasonable" (R. 92). To deny independent judicial examination and consideration to such questions of law is to disregard the recent and repeated admonitions of this Court against the surrender of judicial review. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951); *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498 (1951).

We submit that the decision of the Court below was arrived at only as the result of the Court's failure to review the legal issues raised by the Commission's determination, and that a review of those issues will readily establish the invalidity of the grounds advanced by the Commission to support its denial of reimbursement to United.

II

Under the controlling principles established by the federal courts in Bankruptcy Act cases, the denial of reimbursement cannot be sustained on the grounds that United's services in the reorganization proceedings were "voluntary" and were rendered to advance its own "strong, legitimately selfish reason" for bringing Public Service into compliance with the Act.

The principal reason advanced by the Commission to support its denial of reimbursement is that United's services in the reorganization of Public Service were rendered

primarily for the benefit of United itself. Thus, the Commission's opinion states that (R. 36a-37a):

> "* * * Moreover, United's own compliance with the Act was largely dependent upon compliance by its principal subsidiaries, and it could not resolve its own problems unless and until the problems of the subsidiaries were resolved. Thus, United's participation in these proceedings had the dual aspect of furthering its own compliance as well as protecting its investment in Public Service.
>
> * * *
>
> "The amounts expended by United were costs of *service rendered primarily for its benefit.* In our opinion requiring United to bear the cost of its own participation does not, as it contends, involve the imposition of a penalty, even though that participation may to some extent have otherwise benefited the proceedings. * * *"

And (R. 36a, f.n.):

> "* * * In 1944 United filed an application requesting an extension of time within which to comply with the Commission's order issued in 1943 directing United to cease to be a holding company, and at that time Hickey [its president] testified that further progress by United in compliance with that order was dependent upon substantial compliance with the Act by its major subsidiaries, including Public Service, and he cited measures taken by him to participate actively in the formulation of plans of compliance with the Act by those companies. *The United Corporation,* 18 S. E. C. 35 (1945)." (Emphasis supplied.)

Under the Commission's basic Section 11 Order of August 14, 1943,* United was directed to change its capitalization to a single class of common stock and to cease to be a holding company. To comply with this order, United elected to retire its preference stock by exchanging therefor non-retainable securities of its statutory subsidiaries.

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* *The United Corporation,* 13 S. E. C. 854.

In 1944, when the testimony of United's President referred to in the Commission's opinion was given, the value of the securities of these subsidiaries was depressed by war conditions and, more particularly, by the uncertainties inevitably involved in the reorganization of the several utility systems in which United owned more than ten per cent of the voting securities. Thus, unless United were to dispose of its security holdings at distress prices, its program for retiring its preference stock and divesting itself of any balance of non-retainable securities not used for that purpose was necessarily dependent upon the successful reorganization of its subsidiaries. In wishing to defer disposition of its securities until their latent value had been realized through the consummation of sound reorganization plans and the emergence of the companies from the limbo of reorganization, *United's interest was identical with that of all holders of such securities.*

The Act placed United under no legal compulsion to participate in the reorganization of its subsidiaries and, indeed, United could have brought itself into compliance in 1944 by simply selling its non-retainable securities. But such sales at that time would have spelled disaster for United's common stockholders and very probably would have been harmful to preference stockholders. Practically, therefore, United was under a compelling obligation to its own stockholders to participate in the reorganization of its subsidiaries in order to realize for them the full inherent value of United's investments. By no stretch of the imagination can the desire to get as good a price as possible for what one owns be considered special or unique. *Every other owner of Public Service common stock had the same desire.*

The Commission's conclusion that United should be denied reimbursement because its services were rendered for its own benefit is in direct conflict with the principles governing the Commission's determination of fees and expenses. For under those principles, the controlling effect

of which the Commission itself has in the past recognized, *benefit to the estate, not self-interest or special interest,* is the only valid criterion for determining reimbursement.

The principles established by the federal courts to govern the payment of fees and expenses in cases arising under the Bankruptcy Act are applicable to the present case

In the absence of any express provision in Section 11(e) of the Act relating to the determination of fees and expenses, or of any provision setting forth standards to govern such determinations, the Commission has frequently asserted that it must adhere to the principles laid down by the federal courts in cases arising under the Bankruptcy Act. Thus, under the heading "APPLICABLE PRINCIPLES OF LAW", the Commission has stated (*York Railways Company,* 12 S. E. C. 348, 350 (1942)):

> "The primary point of reference in determining reasonableness of fees and expenses in reorganization proceedings is, of course, the section of the Act, and the rule pursuant to which the applications have been filed.
>
> "In addition, *we believe we must adhere to the principles governing the payment of fees and expenses in proceedings under Chapter X of the Bankruptcy Act.* * * *" (Emphasis supplied.)

Reiterating its adherence to these principles, the Commission has stated (*In the Matter of Electric Bond and Share Company,* 27 S. E. C. 752, 758-759 (1948)):

> "In passing on applications for fees and expenses, we have applied the principles followed by the Federal courts in cases under Section 77B and Chapter X of the Bankruptcy Act, where the general rule is that compensation may be paid out of the estate in reorganization only for such services as have contributed to the formulation of the reorganization plan adopted or to the defeat of a proposed plan, or which were otherwise beneficial in the administration of the estate. * * *"

See, also, *In the Matter of New England Power Association,* Holding Company Act Release No. 8751; *In the Matter of General Gas and Electric Corporation,* Holding Company Act Release No. 8355; *In the Matter of The Laclede Gas Light Company,* 25 S. E. C. 382 (1947).

In a recent decision holding that the Commission's determination of fees and expenses incurred in connection with the dissolution of Engineers Public Service Company pursuant to Section 11(e) was "at loggerheads with previously announced principles governing allowances of compensation in reorganizations under the Holding Company Act" (*In Re Engineers Public Service Co.,* 116 F. Supp. 930, 935 (D. Del. 1953)), Judge Leahy stated (*id.* at p. 937):

> "Unquestionably, award of compensation for services in connection with reorganizations under the Public Utility Holding Company Act of 1935 has been guided by Chapter X practices."

The Commission's opinion in United's case makes no reference to these applicable principles of law, and the reason it advances for denying United's claim is in direct conflict with the very principles by which the Commission in the past has purported to be governed.

Under the applicable and controlling principles established by the federal courts in Chapter X cases, motivation or self-interest is not a relevant factor in the determination of fees and expenses

In denying reimbursement to United, the Commission, in effect has resurrected a distinction originally drawn under the former Section 77B of the Bankruptcy Act, between services rendered in the interest of the estate and services rendered in the interest of a client. That this distinction is not, however, regarded as a valid basis for the denial of an allowance under the more liberal provisions of Chapter X is shown by Professor Moore in his treatise on corporate reorganizations. Thus, Professor Moore states

that (6 Collier on Bankruptcy (14th Edition by Moore and Oglebay), pp. 4510-4511):

> "* * * Under former § 77B, the courts frequently denied allowances for activities as of no 'benefit to the estate' on the basis that *these activities were undertaken primarily in the interests of the parties concerned and not of the estate as a whole.* This was often the result even where the activities in question were related to seeking more favorable terms under the plan for the parties or groups involved, or in opposing a plan favored by the reorganizers or other groups. Since services rendered by most persons and committees acting in the proceedings are in behalf of themselves or the group or interest they represent, and since a reorganization at best is nothing but a reconciliation of conflicting views and rights as reflected in a financial readjustment, an application of the 'benefit to the estate' doctrine in this fashion was indeed questionable * * *" (Emphasis supplied.)

After outlining the objectives of Chapter X, Professor Moore states (id. at pp. 4511-4512):

> "* * * These objectives should not be stifled by a denial of allowances on former § 77B principles which in effect negate the intent of Chapter X. Of course, there will be activities which may be said to be primarily in the interests of an individual or group *alone and in no way beneficial to the administration of the estate or to the plan* and these should not be entitled to compensation or reimbursement from the debtor's estate. * * *" (Emphasis supplied.)

In a leading article on corporate reorganizations, another author, after rejecting as invalid the distinction between services rendered in the interest of the estate and services in the interest of a client, states (Teton, Reorganization Revised, 48 Yale L. J. 573, 607 (1939)):

> "* * * If any distinction is to be drawn, it is between services to the client which contribute nothing at all

> to the reorganization of the property and services which contribute something. It is this distinction that the Chandler Act suggests."

Under the relevant and controlling principles established in Chapter X cases "benefit to the estate" is the criterion for determining compensation, and neither the selfish interest nor the status of the party making the contribution can affect the right to reimbursement. Thus in *In Re Prudence Bonds Corporation,* 122 F. 2d 258, 263 (2d Cir. 1941), the disbursements of a *parent* corporation which contributed to the reorganization were allowed by the Court under Section 243 of the Chandler Act (11 U. S. C. A. 643) notwithstanding that, because the debtor was later found to be insolvent, the parent was excluded from participation in the plan of reorganization. And in *Wisconsin Central Ry. Co. Reorganization* (Finance Docket No. 14720, October 21, 1953), involving a reorganization under Section 77 of the Bankruptcy Act, the Interstate Commerce Commission recently awarded substantial compensation to the Canadian Pacific Railway Company despite the fact that it held a large percentage of the debtor's bonds and, with another company which it controlled, owned almost 50% of the voting rights of the debtor. Granting the allowance, the Commission stated (*id.* at pp. 36-37):

> "There is nothing in section 77 or its legislative history which would indicate an intent by Congress to prohibit allowances for the reasonable expenses, including attorney fees, *incurred by a single party in interest having a status in a proceeding like that occupied by the Canadian Pacific in this case;* and, in our opinion, such allowances should be made in those instances where the services *were beneficial to the debtor's estate and to the formulation of a plan of reorganization.* * * *. The record shows that the services of Canadian Pacific's Counsel * * * were of benefit to the debtor's estate and in the formulation and approval of a plan." (Emphasis supplied.)

"Benefit to the estate" is the only valid standard for determining fees and expenses under the Act

Even if it be assumed that the Commission is not bound by the principles established under Chapter X of the Bankruptcy Act, "benefit to the estate" is nevertheless the only valid standard for determining fees and expenses under Section 11(e) of the Public Utility Holding Company Act. For "benefit to the estate" is the only meaningful standard which is consistent with the "fair and equitable" requirements of Section 11(e).

The underlying reason for compensating a creditor or stockholder whose services in a reorganization have been beneficial is to be found in the maxim "equality is equity." If the services of one member have redounded to the benefit of all, it is fair that all should contribute ratably to the payment of reasonable compensation for such services and reimbursement of the expenses necessarily incurred in rendering them. Conversely, it is unfair and inequitable that members of a class who have made no contribution should have a windfall. As this Court has stated (*Trustees* v. *Greenough,* 105 U. S. 527, 532-534 (1881)):

> "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. * * *
>
> "* * * 'Having come in and proved, and obtained the benefit of the suit which was instituted on their behalf, as well as that of the plaintiff, it cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden, when others have the benefit' * * *."

See, also *Buell* v. *Kanawha Lumber Corporation,* 201 Fed. 762, 768-769 (E. D. S. C. 1912).

The Commission's decision is in derogation of this basic equitable principle for its inevitable effect is to make United, as the holder of 22 per cent of the voting securities of Public Service, pay 100 per cent of the expense of services which benefited all the holders of such securities, and permit 78 per cent to participate in such benefits without making any contribution whatsoever.

To hold that motivation is a relevant factor which may be considered in the allowance of fees and expenses is to create a vague standard by which reimbursement may be arbitrarily denied to those whose services admittedly benefited an entire class. In the last analysis, it must be recognized that each participant in a reorganization is motivated by self-interest. As Professor Moore has stated, with reference to compensation for successful activities of those opposing a plan in Chapter X reorganization proceedings (6 Collier on Bankruptcy (14th Edition by Moore and Oglebay), pp. 4559-4560):

> "* * * *The fact that self-interest may motivate such opposition will not justify a denial of allowance;* all activities by participants in a reorganization naturally have some basis of self-interest. If those opposing the plan are successful in their contentions, then the statute affords them an allowance *regardless of motives.*" (Emphasis supplied.)

III

United was not charged by the Act with a duty to assist Public Service in its program for compliance; but, even if such a duty existed, the expenses incurred by United in successfully discharging it are reimbursable.

The Act (Section 11(b)) places the duty not on the subject companies, but squarely upon the Commission itself "to require by order" that each registered holding company take such steps as may be necessary to comply with

the applicable standards. Section 11(e) provides that a holding company may submit a plan in furtherance of the compliance of a subsidiary. It is permissive, not mandatory.* The language of the Act is so plain that there can be no question whatsoever that United was under no duty to assist Public Service, a large independently managed company, in complying with the Act unless ordered to do so by the Commission. No such order was ever issued and the Commission makes no claim to the contrary. Nevertheless, in its opinion the Commission states (R. 37a):

> "* * * However, the duty of holding companies to bring their systems into compliance with the Act is created by the Act irrespective of the issuance of an order thereunder."

Indeed, the basic Section 11 order issued against The United Corporation in August, 1943 required only that United take the following steps:

> (a) change its own capitalization to a single class of common stock, and
>
> (b) take appropriate steps to cease to be a holding company. (*The United Corporation*, 13 S. E. C. 854)

For over ten years United has been proceeding with steps to comply with that basic order. Each succeeding step has been submitted to the Commission and approved by it. In all those proceedings, it has been implicit that United's duty has been essentially to divest itself of excess

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* The voluntary nature of the method of compliance provided by Section 11(e) was recently emphasized by this Court in a case involving United's final plan. The Court stated (*General Protective Comm.* v. *S. E. C.*, 346 U. S. 521, 529 (1954)):

> "* * * We deal here with the second method of compliance —the voluntary reorganization which the company itself submits *under the broad discretion Congress left to management to determine how to bring their systems into compliance with the Act.* * * *" (Emphasized supplied.)

holdings of the securities of statutory subsidiaries and that the Commission would deal directly with the management of each subsidiary on the requirements of the Act with respect to it.

But even if it be assumed that the Act or an order of the Commission had cast upon United the duty to do what it so successfully did in the reorganization of Public Service, it is a strange conception from a moral standpoint and in the light of the law applicable to bankruptcy reorganizations that services performed in carrying out a duty imposed by statute are not compensable. Under Chapter X of the Bankruptcy Act the court appointed trustee, who is charged with certain duties by statute, is held entitled to reasonable compensation and reimbursement of expenses as a matter of course. Volunteers, on the other hand, must prove a substantial contribution to the proceedings as a prerequisite to any compensation at all. Bankruptcy Act, §§ 241-243; 11 U. S. C. A. §§ 641-643; *In Re Porto Rican American Tobacco Co.*, 117 F. 2d 599, 601 (2d Cir. 1941).

The Commission's conclusion that the discharge of a duty must be attended by a penalty which would not be applicable if no duty were involved is completely at variance with the entire concept underlying the award of allowances and contrary to the fair and equitable standards which the Commission is required by the Act to apply. As Judge Cardozo said in *Schoenherr* v. *Van Meter*, 215 N. Y. 548, 551-552 (1915):

> "• • • The rule is that a trust fund must bear the expenses of its administration, and that a trustee who conducts a litigation to protect the subject of the trust, has a charge on the fund for expenses incurred in the performance of his duties. (*Woodruff* v *N. Y. L. E. & W. R. R. Co.*, 129 N. Y. 27; *Meddaugh* v. *Wilson*, 151 U. S. 333, 343; *Central R. R. & B. Co. of Ga.* v. *Pettus*, 113 U. S. 116). The law which imposes on a director the duty to hold a delinquent officer to account (*Miller* v. *Quincy, supra*), does not deny him indemnity for the expenses of the accounting. • • •"

IV

The Commission's denial of United's claim was arbitrary, capricious and discriminatory, in violation of United's rights under the Fifth Amendment of the Constitution of the United States.

The inequitable nature of the standard contrived by the Commission is further highlighted by a consideration of the possible effects of its application. Since motivation or self-interest is the test advanced by the Commission, it would be natural to assume that the burden, if not equal as to all holding companies, would at least fall most heavily upon a holding company which owned 100 per cent of the stock of a subsidiary and would be lightened progressively as the percentage of ownership, and, therefore, of self-interest, declined. *However, the effect of the Commission's ruling is precisely the opposite.*

It makes no difference to the 100 per cent holding company (except from a tax standpoint) whether it receives reimbursement from its subsidiary or not, since if it does, there is that much less in the subsidiary available for dividends on the stock of which it is the sole owner, and, if it does not, there is that much more. On the 10 per cent holding company, however, the impact of the ruling is substantial, since it has only a 10 per cent interest in the amount retained by the subsidiary through failure to reimburse it for its expenses and in addition does not have the control necessary to insure that it will be reimbursed even to this extent in the form of dividends.

It is elementary that the regulatory sanctions of an administrative agency must be applied fairly and equally. *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80 (1931); *Miller* v. *Nut Margarine Co.*, 284 U. S. 498 (1932). An arbitrary classification in administrative action is just as violative of constitutional rights as an arbitrary classifica-

tion in a statute. Vom Baur, Federal Administrative Law, Sec. 401.

A ruling, which gives a windfall to those who make no contribution to a reorganization at the expense of those who do and penalizes a holding company (which falls in that category in technical statutory contemplation only) without providing any corresponding penalty for one exercising complete domination and control, cannot be sustained under the fair and equitable standards of the Act. Such a ruling is in fact so arbitrary, capricious and discriminatory as to amount to taking United's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. See *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. (2d) 1006, 1007 (Em. App. 1945), cert. denied 324 U. S. 865 (1944).

V

The decision of the Court below is in fundamental conflict with the decision of the Court of Appeals for the Second Circuit in In re Electric Power & Light Corp., 210 F. 2d 585 (1954).

The reorganization of Public Service under the Act was entirely separate from that of United. United's reorganization involved two things: (1) eliminating its own preference stock, and (2) disposing of stock in other companies which it could not retain under the Act. The reorganization of Public Service had nothing whatsoever to do with either the recapitalization of United or the divestment of its security holdings. The fact that after the reorganization of Public Service United's investment increased in value and the securities it received could then be used, without sacrificing the interests of holders of its common stock, as a vehicle for acquiring and retiring shares of its own pref-

erence stock does not make the reorganization of Public Service a part of the reorganization of United.

In *In re Electric Power & Light Corp.*, 210 F. 2d 585 (2d Cir. 1954), Electric Bond and Share Company participated in the reorganization of its subsidiary, Electric Power & Light Corporation and in so doing incurred certain expenses, including a fee of Drexel & Company of $100,000 for expert financial advice. The Commission denied the parent reimbursement from the subsidiary* and the parent did not appeal from an order of the District Court upholding the Commission's decision. The Commission proceeded to cut the fee payable by the parent to Drexel & Co. from $100,000 to $50,000. On appeal by Drexel & Co. the Court of Appeals for the Second Circuit held that the Commission lacked jurisdiction to determine what the parent should pay for services rendered to it in the reorganization of the subsidiary.

The position of the Commission in that case is stated by the Court as follows (210 F. 2d at p. 588):

> "* * * That of the Commission is that in a proceeding under Section 11 (e) of the Act it is by statute given jurisdiction to supervise all fees and expenses which are paid by a registered holding company whether they be paid by the company reorganized or another registered holding company of which the reorganized one is a subsidiary. The rea-

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* *In the Matter of Electric Power & Light Corporation*, Holding Company Act Release No. 11175. A substantial part of the parent's efforts in the reorganization of the subsidiary were expended in defending itself against and settling claims for alleged wrongful acts committed against the subsidiary. The Commission found such activities inseparable from its other activities and denied reimbursement on the grounds (among others) that the parent had conflicting interests, citing *Woods* v. *City Bank & Trust Co.*, 312 U. S. 262 (1941). No such tenable basis for denying reimbursement existed here.

soning is that as Electric was a subsidiary of Bond and Share which was required to comply with the provisions of the Act, its dissolution in these proceedings was a step taken, and necessarily taken, in bringing Bond and Share into compliance with the statute. * * *"

The Court rejected this argument and stated (*id.* at p. 589):

"* * * In other words, the fee to be paid Drexel & Company by Bond and Share is but a business expense of Bond and Share itself like, for instance, what it may have paid in salaries to its own staff for services performed for it in connection with the reorganization of Electric or otherwise to protect its own interests and, not being an obligation to be discharged by Electric directly or indirectly, the amount of it is an irrelevant factor in determining whether Electric's plan is fair and equitable to those persons who are affected by it."

Implicit in, and necessary to, this decision is the determination that the reorganization of Electric is not a part of the reorganization of Bond and Share, for the jurisdiction of the Commission to determine what fees and expenses Bond and Share should pay in connection with its own reorganization can hardly be doubted. *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S. D. N. Y. 1948).

Similarly, if the reorganization of Public Service is not part of the reorganization of United, the basic theory of the Court below, that each company should pay the costs of its own reorganization, becomes untenable, and there is nothing to bar United any more than any other stockholder whose services in the reorganization have benefited the estate from receiving reimbursement of its expenses in accordance with the applicable legal principles discussed in Point II above.

The decisions of these two Courts of Appeals are in conflict on the important question whether the reorganiza-

tion of a subsidiary is a part of the reorganization of its parent. We submit that this Court should grant certiorari to answer this question and to determine whether United was properly denied reimbursement for services which are conceded to have been beneficial in the reorganization of its subsidiary.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 99

THE UNITED CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 88) [1] is reported in 211 F. 2d 231. The findings and

[1] References preceded by a letter "R" refer to the document labelled "Appendix to Petitioner's Brief," pages 1a to 45a, or to the record of the proceedings in the court below, pages 46 to 93; references preceded by the letters "RR" refer to the document labelled "Appendix to Respondent's brief." For convenience, the petitioner sometimes will be referred to as "United," the respondent as "the Commission ," Public Service Corporation of New Jersey as "Public Service," Public Service Electric and Gas Company as "PEG," and the Public Utility Holding Company Act of 1935 as the "Act."

opinion of the Securities and Exchange Commission (R. 26a), Holding Company Act Release No. 12,000, are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1954 (R. 93). The petition for a writ of certiorari was filed on May 27, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 15 U.S.C. 79x.

QUESTION PRESENTED

Did the court below correctly affirm the Securities and Exchange Commission's decision that a registered holding company may not recover from a subsidiary company the fees and expenses paid by the parent company in connection with the reorganization of the subsidiary?

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 are set forth in the Appendix, *infra,* pp. 18-21.

STATEMENT

The United Corporation, a registered holding company under the Public Utility Holding Company Act of 1935, seeks review of a judgment affirming an order of the Securities and Exchange Commission which disallowed United's claim for reimbursement of fees and expenses incurred in the reorganization of a subsidiary company, Public Service Corporation of New Jersey, pursuant to

Section 11(e) of the Act. The services were rendered to United by persons United retained to represent its interests in the reorganization of Public Service, also a registered holding company under the Act.

In connection with its reorganization proceedings, Public Service retained its own counsel and experts in the proceedings and paid approximately $1,300,000 in fees and expenses. These fees and expenses have been approved by the Commission. United seeks to compel PEG, successor in reorganization of Public Service, to pay in addition the fees and expenses incurred by United.

Public Service, organized in 1903,[2] was exclusively a holding company owning substantially all the voting securities of four public utility companies, chief of which was Public Service Electric and Gas Company, engaged in the electric and gas utility business in the State of New Jersey.

United, a Delaware corporation, was organized in 1929 by representatives of several large public utility holding companies including The United Gas Improvement Company[3] and Public Service. In 1935, when the Act was passed, United and UGI each held more than 10% of the voting securities of Public Service.

Prior to 1942, Public Service sought to avoid regulation and reorganization under the Act by applying to the Commission for an order, under

[2] *Public Service Corporation of New Jersey*, 10 SEC 89, 94-96 (1941).

[3] For convenience referred to as UGI.

Section 2(a)(8), declaring that it was not a subsidiary of either company on the ground that it was not controlled by or subject to the controlling influence of either. The Commission denied the application [4] and its decision was affirmed.[5] United and UGI also sought unsuccessfully to maintain their interests in Public Service, United through the filing of a plan proposing the retention of just under 10% of the outstanding voting securities of Public Service, and UGI through the contention that its Public Service holdings were retainable. UGI abandoned its contention,[6] and consummated a plan whereby its holdings in Public Service were distributed to its own stockholders including United. After the 1943 distribution of UGI holdings of Public Service common stock, pursuant to the reorganization of UGI under the Act,[7] United owned 28.03% of the common stock of Public Service, carrying 21.65% of the voting power. On August 14, 1943, the Commission disapproved the United plan, and directed United to recapitalize with common stock only and to cease to be a holding company.[8]

United then commenced a program for compliance involving generally the use of the securities

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[4] *Public Service Corporation of New Jersey*, note 2, *supra*.

[5] *Public Service Corporation of New Jersey* v. *SEC*, 129 F. 2d 899 (C.A. 3), certiorari denied, 317 U.S. 691.

[6] See *The United Gas Improvement Company*, 12 SEC 1080, 1089 (1943).

[7] *Ibid.*

[8] *The United Corporation*, 13 S.E.C. 854.

which United would receive through Section 11 reorganizations of its major subsidiaries to retire its own preference stock. The ultimate success of United's program, partly achieved in 1944,[9] depended in large measure on substantial compliance with Section 11 of the Act by three subsidiaries, including Public Service.[10]

Beginning in the latter part of 1943, United pressed for a reorganization of Public Service in order to forward its own program for compliance with Section 11, and at one point threatened to bypass the Public Service management and file its own Section 11(e) plan for the reorganization of Public Service (RR. 54a-56a).

As a result of the demands of United, the Public Service board, in December 1945, appointed Hickey, the President of United, a member of a committee of four directors to press for a reorganization plan (RR. 57a).

In June 1946, the Commission instituted proceedings directed to Public Service, its subsidiaries and United to determine the steps, if any, necessary to bring the Public Service system into compliance with Sections 11(b)(1) and 11(b)(2) of the Act.[11] The order also revoked an exemption

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[9] In 1944 United distributed the common stock of Philadelphia Electric Company received in the 1943 reorganization of UGI, together with cash, to retire approximately 45% of United's outstanding preference stock. See *The United Corporation*, 17 SEC 404, affirmed, *sub nom. Phillips* v. *SEC*, 153 F. 2d 27 (C.A. 2), certiorari denied, 328 U.S. 860.

[10] See *The United Corporation*, 18 SEC 35, 41.

[11] Holding Company Act Release No. 6693 (June 12, 1946).

from certain provisions of the Act which Public Service had obtained under the provisions of the Commission's Rule U-12. On August 15, 1946, Public Service, which had registered as a holding company shortly before that date,[12] filed a plan pursuant to Section 11(e) of the Act.

Public Service, under the terms of the plan, was to be dissolved. The claims of its public security holders were to be satisfied by exchange of their securities for new securities to be issued by PEG. Negotiations on various aspects of the plan followed throughout 1946 and continued well into 1947. As a result of these negotiations, on June 4, 1947, all parties actively participating in the proceedings reached an agreement increasing allocations to the Public Service preferred stockholders. The plan was amended to incorporate the agreement, was approved by the Commission,[13] and was approved and enforced by the United States District Court for the District of New Jersey. (RR. 1a, 21a, 22a.) [14]

In approving the plan, the Commission specifically retained jurisdiction over all fees, expenses and liability for other remunerations incurred and to be incurred in connection with the plan and the transactions incident thereto (RR. 22a). The order

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[12] Prior to its registration in 1946, Public Service had been subject to the Act only because of its status as a subsidiary of United.

[13] *Public Service Corporation of New Jersey*, Holding Company Act Release No. 7964 (December 20, 1947), 27 SEC 682 (1948).

[14] *In re Public Service Corporation of New Jersey*, unreported, D. N.J., Civil Action No. 11105, March 19, 1948.

of the District Court enforcing the plan directed Public Service or its assignee to pay such fees and expenses in connection with the plan or the proceedings with respect thereto as the Commission would determine, award, allow, or allocate (RR. 22a).

On September 24, 1948, United filed an application with the Commission requesting an order of the Commission authorizing United to pay $33,580.56 for fees and expenses incurred in the reorganization of Public Service and directing PEG (as successor to Public Service) to repay that amount to United. (R. 4a-9a). The major item for which United requested reimbursement was the combined fee and disbursements for legal services rendered by United's counsel, the firm of Whitman, Ransom, Coulson and Goetz (R. 11a).[15]

On June 16, 1953, the Commission issued its findings and opinion and order approving the proposed payments by United, but disallowing the claim of United against PEG. The Commission found that United as a registered holding company had a statutory duty to bring its system into compliance with the Act, and that United's participation in the Public Service reorganization was actually in furtherance of its own compliance with Section 11 as well as to protect its investment in the subsidiary.[16]

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[15] The firm name has since been changed to Whitman, Ransom & Coulson.

[16] Public Utility Holding Company Act Release No. 12,000 (R. 26a).

On August 7, 1953, United filed a petition for review in the United States Court of Appeals for the Third Circuit (R. 46). On February 24, 1954, the Court of Appeals for the Third Circuit affirmed, stating (R. 92-93):

> In our judgment the Commission's decision was in accordance with the high purpose of Section 11(e) and founded upon substantial evidence.

ARGUMENT

The decision of the court below is correct and is in conformity with the decisions of other courts which have decided the same question.

1. The decision of the court below denying United reimbursement for fees and expenses incurred in the reorganization of its subsidiary under Section 11(e) of the Act is in conformity with specific holdings of courts in the First, Second, and Eighth Circuits which have passed upon the question. *In the Matter of Eastern Gas and Fuel Associates,* 120 F. Supp. 460 (D. Mass.), appeal pending, C.A. 1, No. 4853; *In re Niagara Hudson Power Corp.,* 114 F. Supp. 683 (N.D. N.Y.), appeal pending, C.A. 2, No. 3476; *In re Northern States Power Company,* 119 F. Supp. 331 (D. Minn.), affirmed *sub nom. Standard Gas and Electric Co.* v. *SEC et al.,* 212 F. 2d 407 (C.A. 8).

In re Electric Power and Light Corporation, 210 F. 2d 585 (C.A. 2), cited by petitioner, is not in conflict with the decision below. The issue decided by the court below was not involved in the court proceedings, but was presented in the fee proceed-

ings before the Commission. Electric Bond and Share Company, like United, had participated in the reorganization of Electric Power & Light Corp., a subsidiary holding company, and sought reimbursement of the fees and expenses incurred in connection therewith. The Commission, as in the instant case, denied the application for reimbursement. Bond and Share did not contest that denial in the court proceedings.

The sole ruling of the Court of Appeals in that case, that the Commission was without jurisdiction to pass upon the amount of the fees and expenses payable by the parent holding company from its funds to a financial adviser, is believed by the Commission to be wrong,[17] but involves no conflict with the holding of the court below in this case. Indeed, the significance of *In re Electric Power and Light Corporation* for this case is that there the Court of Appeals for the Second Circuit took for granted the Commission's power to deny Bond and Share's claim for reimbursement by its subdsidiary, stating:

> Thus it was plainly within the jurisdiction of the Commission to deny in the exercise of sound discretion the application of Drexel and Company, for the allowance of its fee to be paid by Electric for services rendered Bond and Share, and no one questions that. As much is true, of course, in respect to the application

[17] A petition for a writ of certiorari seeking a review of the judgment of the United States Court of Appeals has been filed. *SEC* v. *Drexel and Co.*, 210 F. 2d 585 (C.A. 2), petition for a writ of certiorari pending, October Term (1954) No. 153.

of Bond and Share for allowance to be paid by Electric.[18]

2. The Commission's order disallowing United's claim for reimbursement of fees and expenses incurred in the reorganization of Public Service pursuant to Section 11(e) of the Act was a proper administrative decision, correctly affirmed by the court below on review pursuant to Section 24(a) of the Act.

Allowance of fees is one of the large areas of discretion "committed by the Act to that judgment [of the Commission]," *SEC* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 126; *Standard Gas & Electric Co.* v. *SEC, supra,* at p. 411; *In re Niagara Hudson Power Corp., supra* at p. 685. The Commission's authority to pass upon allowance of fees and expenses in Section 11(e) proceedings is found in Sections 11(e) and 11(f) and 7, 10, and 12 of the Act. Moreover, the petitioner here does not challenge the Commission's jurisdiction to pass upon such allowances.

During the entire course of its administration of Section 11 of the Act, the Commission has passed upon claims of registered holding companies to be reimbursed for services rendered in connection with the reorganization of their subsidiaries. In passing upon such cases, the Commission has developed on a case-to-case basis the general policy of requiring registered holding companies to pay their own expenses incurred in reorganizations of

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[18] *In re Electric Power and Light Corporation, supra,* p. 588.

their subsidiary companies, including the fees of lawyers and experts they retain.[19]

Under Section 11(b) of the Act, United, as a registered holding company, was charged with the duty of bringing its holding company system into compliance therewith. This statutory obligation was reinforced by the Commission's 1943 order directed to United.[20] United's compliance with that order depended in part upon a reorganization of Public Service that would also bring Public Service into compliance with Section 11(b).

United recognized the necessity for compliance by Public Service as a part of its own program of compliance (RR 25a, 54a-56a). Thus, United's president, in testifying on an application for an extension of time for United's own compliance, stated:[21]

> * * * that further progress in connection with the program depends on substantial compliance with Section 11 of the Act by the major

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[19] *Northern States Power Co.*, Holding Company Act Release No. 11145 (April 8, 1952), approved on that point, *In re Northern States Power Company, supra*, affirmed *sub nom. Standard Gas and Electric Co.* v. *SEC, et al., supra; Electric Power and Light Corporation*, Holding Company Act Release No. 11175 (April 21, 1952); *Portland Gas and Coke Company*, Holding Company Act Release No. 11560 (October 31, 1952); *Niagara Hudson Power Corporation*, Holding Company Act Release No. 11667 (January 14, 1953), approved, *In re Niagara Hudson Power Corp., supra; Eastern Gas and Fuel Associates*, Holding Company Act Release No. 11954 (May 29, 1953), approved on that point, *In re Eastern Gas and Fuel Associates, supra.*

[20] *The United Corporation*, 13 S.E.C. 854.

[21] *The United Corporation*, 18 S.E.C. 35, 41.

subsidiaries of United: namely, Columbia Gas & Electric Corporation, Public Service Corporation of New Jersey and Niagara Hudson Power Corporation.

The Public Service reorganization was of special benefit to United—and this wholly separate from benefits which United shared pro rata with other stockholders. As the Commission found (R. 37a), the primary purpose of United's participation was to fulfill its own statutory obligations and to obtain for itself maximum benefits from the plan. Any benefit Public Service's estate received by virtue of United's presence in the proceedings was merely incidental to this purpose. It does not seem unreasonable, under the circumstances, that United should pay its own counsel fees and expenses.[22]

The Commission's denial of United's application was not based merely upon United's status as a holding company. In arriving at its decision, the Commission considered all aspects of United: its particular status as a registered holding company under the Act; its ownership of securities representing 22% of the voting power in Public Service; its statutory right under Section 11(e) to file plans for the reorganization of Public Service; and its statutory obligation to effect such a reorganization of Public Service, in order to conform itself to the provisions of the Act (R. 35a-38a).

The Commission's conclusion represented a con-

[22] See *In re Northern States Power Company, supra; In re Niagara Hudson Power Corporation, supra.*

sidered judgment that in those circumstances it would not be fair and equitable to require Public Service to pay United's costs. It represented a policy determination in an administrative area in which the Congress has given the Commission primary responsibility[23] and which should not be disturbed unless it lacked "any rational and statutory foundation". *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207.

The denial of reimbursement to United does not constitute a penalty on United nor is it a deprivation of due process. United participated actively in the management of Public Service and in the employment of counsel and experts by Public Service to conduct the reorganization (*supra*, pp. 3, 5). In addition, United chose to participate through its own counsel and experts in furtherance of its own program of compliance with the Act. Indeed it would be a penalty on the public stockholders of Public Service, who paid approximately $1,300,000 for fees and expenses incurred by Public Service, to require that they also reimburse United for expenses incurred by it to advance its own ends. The Commission's conclusion represented a reasonable classification, not arrived at arbitrarily, but based on the circumstances of the case.

The plain answer to petitioner's charge that the Commission's ruling was arbitrary, capricious and

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[23] See discussion of Section 11 in Senate Report No. 621, 74th Congress, Report of Senate Committee on holding company bill, and statement of Senator Wheeler, Chairman of Committee, 79 Cong. Rec. 4607, March 28, 1935.

discriminatory is that prior determinations by the Commission in situations involving similar facts have established a pattern of administrative consistency by the Commission in this area.[25] As Judge Foley noted in the *Niagara Hudson* case:[26]

> Previous determinations by the Commission are in line with the decision now discussed. One determination was rendered after the decision challenged here and indicates an honest belief in and reiteration of its previous position. As always, distinctions may be made in the facts but enough similarity is present to show a consistency by the Commission, and thus answer the charge that it was capricious and arbitrary in this instance.

The petitioner's contention that controlling principles under Chapter X of the Bankruptcy Act required allowance of its claim for reimbursement is without substance. We may assume, *arguendo*, that under Chapter X the principal standard for determining the fees and expenses payable out of the reorganization estate is the benefit to the estate resulting from services rendered in the reorganization.[27] As petitioner contends, in passing upon ap-

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[25] See note 19, *supra*.

[26] *In re Niagara Hudson Power Corp.*, *supra*, at p. 688.

[27] But see 6 Collier on *Bankruptcy* (14th Ed.; Moore and Oglebay), p. 4510:

> Services which are compensable as beneficial to the administration of the estate should not be those which merely duplicate or undertake the required duties of the officers thereof. Nor should activities undertaken by parties in the performance of some statutory obligation merit an allowance of compensation.

plications for fees and expenses, the Commission has generally followed principles governing the payment of fees and allowances in Chapter X proceedings. But petitioner has pointed to no provision of the Bankruptcy Act or the Public Utility Holding Company Act, and we are aware of none, which precludes the Commission from developing and applying additional principles and policies adapted to the peculiar problems of holding company reorganizations under the Act. Indeed, this Court has held that in the treatment of problems common to both Acts, the Commission's powers are not defined exclusively by the principles which control in bankruptcy proceedings, but may be exercised to develop new principles reasonable and appropriate to fulfill the objectives of the Holding Company Act. *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194.

The Commission, in denying United's claim for reimbursement, applied to the facts of this case a Commission policy developed within its own specialized area of experience and expertise, and consistently applied in similar situations. The only question of law presented in this and similar cases is: "Does such conclusion have the necessary rational and statutory foundation to allow it freedom from judicial disturbance?" [28]

S. E. C. v. *Cogan*, 201 F. 2d 78 (C. A. 9), opinion on rehearing 201 F. 2d 82, cited by petitioner (Pet. p. 9), is not pertinent to the issue here. The question presented in that case was whether an attorney

[28] *In re Niagara Hudson Power Corp., supra*, at page 687.

had breached his fiduciary duties as such, and thus had properly been denied compensation for services rendered in a Section 11(e) proceeding. In holding the *Chenery* doctrine inapplicable, the Court of Appeals found "nothing in the situation present here which would call for any special, commission-made standard of professional ethics or of fiduciary duty," and that "if any 'expertise' was involved, it belonged to the district judge . . ."

This case does not involve an evaluation of professional services or conduct such as courts often make in other contests. We are here dealing with a determination involving specifically an aspect of the relationship between registered holding companies and their subsidiaries in Section 11(e) reorganizations, which is peculiarly within the Commission's competence.

CONCLUSION

The case was decided correctly below. The decision of the court below is not in conflict with holdings in other circuits and there is no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM H. TIMBERS,
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MYRON S. ISAACS,
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JULY, 1954

APPENDIX

Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*):

Sec. 11 * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system. * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *

* * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem neces-

sary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole

trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as

defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of

the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 99

THE UNITED CORPORATION,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER, THE UNITED CORPORATION

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August 5, 1954.

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The point to be emphasized in this reply is that the Commission has failed to demonstrate any statutory or judicial authority to support its denial of reimbursement to United. Rather, the Commission relies on its expectation of judicial deference to administrative experience.

The Commission's brief asserts that "the Commission has developed on a case-to-case basis the general policy of requiring registered holding companies to pay their own expenses incurred in reorganization of their subsidiary companies" (Brief, pp. 10-11); the Commission's order was a "proper administrative decision" (*id.* at p. 10); the allowance of fees is "one of the large areas of discretion" committed to the Commission's judgment (*id.*); the Commission's conclusion "represented a considered judgment", "a policy determination in an administrative area in which the Congress has given the Commission primary responsi-

bility'' (*id.* at pp. 12-13); prior determinations by the Commission ''have established a pattern of administrative consistency'' (*id.* at p. 14); and the Commission ''applied to the facts of this case a Commission policy developed within its own specialized area of experience and expertise'' (*id.* at p. 15).

Nowhere is the Court told why the determination in United's case should be regarded as a non-reviewable application of administrative policy or how it differs from the Commission's determinations which were reviewed and annulled in *S. E. C.* v. *Cogan,* 201 F. 2d 78, 82 (9th Cir. 1951), and in *In re North American Light & Power Co.,* 101 F. Supp. 931, opinion on rehearing, 106 F. Supp. 686 (D. Del. 1952), *aff'd* 202 F. 2d 638 (3d Cir. 1953), *cert. denied sub nom., S. E. C.,* v. *Masterson,* 346 U. S. 818 (1953). An administrative decision on a question of law does not become a determination of ''Commission policy'', developed in a ''specialized area of experience and expertise'', merely on the Commission's own say-so.

The Commission has never held that the allowance of reimbursement to holding companies for beneficial services performed in the reorganization of their subsidiaries would tend to promote undersirable practices in reorganizations, encourage unnecessary participation, or hinder or obstruct in any way the reorganization, integration or dissolution of holding companies under the Public Utility Holding Company Act of 1935.* No reason is given in the present case for the claim that the denial of reimbursement to United represents ''a policy determination in an administrative area,'' except, it appears to us, the general attitude that a public utility holding company is by definition a tainted organization to be denied relief extended to untainted claimants.

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* Although the Commission's brief notes that Public Service has paid approximately $1,300,000 in fees and expenses, it does not argue that the imposition of an additional $33,000 in expenses would adversely affect the reorganization.

The Commission's disavowal of principles established under the Bankruptcy Act

In its petition, United urged that under principles established in Chapter X reorganization proceedings, by which the Commission in the past has purported to be governed, it was entitled to reimbursement in this case. The Commission now disavows those principles and argues that there is nothing in the Bankruptcy Act or in the Public Utility Holding Company Act "which precludes the Commission from developing and applying additional principles and policies adopted to *the peculiar problems* of holding company reorganizations under the Act." (Emphasis supplied.)

But the Commission undertakes no exposition of "the peculiar problems" which it feels justify its departure in this case from the principles it has hitherto acknowledged.

We submit that this Court's decision in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 is not properly cited to support the sort of administrative authoritarianism espoused by the Commission in this case.

The petition for certiorari should in all respects be granted.

Respectfully submitted,

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